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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 523

DOROTHY HENNESEY, doing business as Hennesey & Co., a sole proprietorship,

Petitioner,

vs.

HENRY CROWN, IRVING CROWN, EDWARD A. CROWN, ROBERT CROWN, LESTER CROWN, HERMAN CROWN, SIDNEY J. MARKS, GEORGE W. LENZIE, FRANK NUGENT, STUART COLNON, JOSEPH P. BINNS, GEORGE B. HARRINGTON, HUGO A. ANDERSON, MATERIAL SERVICE CORPORATION, an Illinois corporation, and GENERAL DYNAMICS CORPORATION, a Delaware corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SAMUEL W. BLOCK,
ROBERT E. PFAFF,
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Respondents pray that the Writ of Certiorari be denied.

OPINIONS BELOW

The United States District Court for the Northern District of Illinois, Eastern Division, not the United States Court of Appeals for the Seventh Circuit, filed an opinion [illegible]. However, the District Court did enter an order of Dismissal on February 4, 1960, which is reproduced in the Appendix hereto at pages 9 to 12. The Order of Dismissal entered by the Court of Appeals on August 11, 1960, is also reproduced in the Appendix, *infra*, at page 13.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered August 11, 1960. No rehearing was sought. Petitioner has invoked the certiorari jurisdiction of this Court pursuant to 28 U.S.C. s. 1254(1).

QUESTION PRESENTED

Respondents cannot accept as the issue the question framed by the petitioner. The issue, if indeed there is an issue, is: Whether the United States Court of Appeals for the Seventh Circuit in dismissing petitioner's cause for want of prosecution because of petitioner's failure to file her brief and record appendix, which dismissal was entered only after three successive generous extensions of time within which to file the aforesaid documents were allowed and a fourth denied, has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's exercise of its supervisory power.

STATEMENT OF THE CASE

Petitioner's statement of the case is incomplete. Respondents deem it necessary to elaborate on what transpired below:

Petitioner, a resident of the State of New Jersey, was, prior to the institution of this suit, the registered owner of [illegible] shares of common stock of Material Service Corporation, out of 76,543 shares outstanding. The action was commenced in the United States District Court for the Northern District of Illinois, Eastern Division, on December 24, 1959, seven days before the scheduled merger of Material Service Corporation with and into General Dynamics Corporation pursuant to notices to their respective shareholders dated November 24, 1959 (Dynamics) and November 27, 1959 (Material Service). The petitioner sought, inter alia, to enjoin the merger of the two corporations and to have the Material Service Corporation dissolved.

The trial court (Hoffman, J.) dismissed the cause on February 4, 1960, for petitioner's wilful and deliberate failure to appear for the taking of her deposition. The order of dismissal was entered only after

(a) the denial of her motion to excuse her from attending the taking of her deposition;

(b) consideration by the District Court of her objections and counter affidavits and brief in support thereof to respondents' motion to dismiss her suit because of her said wilful failure; and,

(c) [illegible] afforded by the District Court and [illegible] again refused an opportunity to submit herself for the taking of her deposition.

Notice of appeal was filed on March 3, 1960. The record on appeal was filed in the Court of Appeals on April 1, 1960, and petitioner's brief and record appendix were due May 12, 1960. On the latter date, petitioner filed a motion to extend the time for filing her appendix and brief to June 10, 1960, on the ground that her counsel had been engaged in other matters and had been unable to attend the preparation of petitioner's brief and appendix. (Add'l R. 2-6). On May 13, 1960, the Court of Appeals entered an order extending the filing time to June 10, 1960. (Add'l R. 6).

On June 9, 1960, the day before her brief and record appendix were due, petitioner again moved for an extension of time to file her appendix and brief to July 8, 1960, basing the motion upon the same ground as the previous motion. (Add'l R. 7-10). The Court of Appeals again indulged petitioner and granted another 30-day extension to July 8, 1960, by an order entered June 13, 1960. (Add'l R. 11).

On July 8, 1960, the day her brief and record appendix were due, petitioner filed a third motion asking this time for a six week extension to August 22, 1960. Counsel said not, until immediately preceding the filing of the motion, advised the Clerk that he was electing to have the record appendix printed by the contract printer under the Clerk's supervision rather than by one of the several other Court printers also authorized to print records in the Court of Appeals. (Add'l R. 14). As in the case of the two previous motions for extension the affidavit stated that petitioner's counsel had not undertaken the preparation of petitioner's brief. (Add'l R. 14-16). Respondents filed objections to the motion. (Add'l R. 17-33). On July 15, 1960, the Court

References are to the additional portions of the record designated by respondents and filed with the Clerk of this Court herewith.

Appeals further indulged petitioner and entered its order extending the time for filing the appendix and brief for an additional two weeks to and including August 1, 1960. (Add'l R. 34).

On July 28, 1960, being three days preceding that upon which her brief and appendix were due, petitioner filed a motion asking a fourth extension of four additional weeks to and including August 31, 1960.

It appeared from the motion and supporting affidavit that the record had been delivered to the contract printer on July 12, 1960, three months after the record had been filed in the Court of Appeals. The application for extension was based on the statement of counsel that it would not be possible to print the record appendix short of August 31, 1960, or some six weeks from the time it was received by the printer. However, in a skeleton affidavit, one sentence in length and appended to the motion, one L. R. Veit, a sales representative of the printer, stated only that he "feels it will require an extension for the printing of the appendix, to and including August 31, 1960". There was nothing in the motion on the subject of any effort on the part of petitioner's counsel to prepare petitioner's brief.

Respondents filed objections to the motion attacking the representations thereof, particularly the representations in the motion and supporting affidavit respecting the printing of the appendix.

The Court of Appeals denied this fourth request.

Petitioner did not file her brief or record appendix on or before August 1, 1960, and accordingly, on August 4, 1960, respondents moved to dismiss the appeal. Five days later, August 9, 1960, petitioner filed objections to respondents' motion together with her alternative motion for late filing of her printed brief and record appendix instanter.

The Court of Appeals denied petitioner's motion for late filing and granted respondents' motion to dismiss the cause for want of prosecution on August 11, 1960, some five months after the filing of the notice of appeal.

Petitioner seeks to somehow place upon the Clerk of the Court of Appeals and the printer designated by petitioner the responsibility for her failure to file her brief and record appendix during the four month period from April 12, 1960 to August 9, 1960.

Petitioner was, of course, free to select any printer to print the appendix and did not elect to have the appendix printed by the contract printer under the supervision of the Clerk until July 7, 1960 (Add'l R. 1), and did not pay the Clerk the required estimated printer's fee charges until July 11, 1960. (Add'l R. 1).

REASONS FOR DENYING THE WRIT

The petition for Writ of Certiorari is in poor grace, not to mention its lack of merit. Petitioner's action in the District Court was dismissed because of her wilful and deliberate failure and refusal to appear for the taking of her deposition. Her appeal was dismissed because of her failure to file her printed brief and record appendix despite the fact the Court of Appeals had indulged her three gratuitous extensions of time aggregating more than two and one half months and the case had been pending in the Court of Appeals for four months. The appeal involved only the simple issue of whether the District Court had acted within its discretion under Federal Rule of Civil Procedure 37 in dismissing petitioner's action because of her wilful and deliberate refusal and failure to appear for the taking of her deposition.

The dismissal of petitioner's appeal was pursuant to the power granted the Court of Appeals by the second para-

graph of Rule 73(a) of the Federal Rules of Civil Procedure for petitioner's failure to comply with subdivision (g) of Rule 73.

The Court of Appeals dismissal of the cause for petitioner's failure to comply with the Court's order that she file her brief and appendix on or before August 1, 1960, was a perfectly proper act within the sound discretion of that Court. The Court acted only after granting two successive generous extensions amounting to 57 days, shortening a third request from 45 to 24 days and denying a fourth request for an additional 30 days.

Matters of the nature here involved are clearly within the discretionary power of the Courts of Appeal and do not present any issue upon which this Court should speak. The authorities relied upon by petitioner are not apropos. The fact that in some instances Courts of Appeal have declined to dismiss causes where the appendix and brief are filed late while in others an order of dismissal has been entered, does not present any conflict between the circuits. Whether or not to dismiss for want of prosecution under these circumstances is, under Rule 73 of the Federal Rules of Civil Procedure, properly left to the discretion of the Courts of Appeal. Variance either between the circuits or from case to case within any particular circuit reflects not a conflicting view or application of the law but rather a variance in the particular facts in the various cases presented. Different cases and different facts and circumstances would, of necessity, lead to different results. Variation in result, rather than lack of it, is consistent with the proper exercise of the discretionary power and itself reflects the awareness of the Courts of Appeal to the particular circumstances involved in each individual situation.

The petition is an affront to the Court of Appeals for the Ninth Circuit which granted petitioner three extensions of time to file her printed brief and record appendix

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALBERT E. JENNER, JR.,
SAMUEL W. BLOCK,
ROBERT E. PFAFF,
Attorneys for Respondents.
Henry Crown, Irving Crown, Edward A. Crown, Robert Crown, Lester Crown, Herman Crown, Sidney J. Marks, George W. Lenzie, Frank Nugent, Stuart Colnon, Joseph P. Binns, George B. Harrington, Hugo A. Anderson, and Material Service Corporation.

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APPENDIX

In the United States District Court
For the Northern District of Illinois

Eastern Division

Dorothy Hennesey, doing business as Hennesey & Co., a sole proprietorship, Plaintiff, vs. Henry Crown, et al., Defendants.	Civil Action No. 59 C 2063

ORDER.

This cause comes on to be heard on the motion of defendants Henry Crown, Irving Crown, Edward A. Crown, Robert Crown, Lester Crown, Herman Crown, Sidney J. Marks, Frank Nugent, Stuart Colnon, George B. Harrington, Hugo A. Anderson, and Material Service Corporation, an Illinois corporation, to strike plaintiff's complaint and dismiss the action for wilful failure of plaintiff to appear and give her deposition after being served with proper notice. Due notice of defendants' motion has been given all counsel of record in the cause. Defendants' motion and brief were presented and filed January 13, 1960. On motion of plaintiff, leave was granted her to file counter-affidavits in opposition to defendants' motion, together with her opposing brief. Thereafter this time was further extended on plaintiff's motion. On January 26, 1960, plaintiff filed her brief, together with the affidavit of Dr. George R. Henshaw. The Court has considered the motion and the briefs of the parties in support thereof and in opposition thereto, plaintiff's complaint, plaintiff's motion of January , 1960, to change the place of taking her deposition, and

her brief and affidavit in support thereof, the above-mentioned affidavit of Dr. Henshaw, the transcript of the proceedings had at the time and place prescribed for the taking of plaintiff's deposition, the deposition of her counsel Milton K. Joseph, Esq., and the transcript of the various proceedings heretofore had before the Court. The Court is otherwise fully advised in the premises.

The Court finds:

(1) Plaintiff, who on the face of the record, is a resident of the State of New Jersey and the registered owner of 10 shares of the common stock of Material Service Corporation, out of 76,543 shares outstanding, commenced her action in this Court on December 24, 1959, by the filing of a complaint for injunctive and other relief signed and verified in her behalf by her counsel, Milton K. Joseph, Esq.

(2) Defendant Material Service Corporation, an Illinois corporation, was served with summons on December 28, 1959. On the following day, December 29, 1959, it served upon plaintiff, by service upon her counsel Milton K. Joseph, Esq., a proper notice pursuant to the Federal Rules of Civil Procedure for the taking of her deposition, and that of her counsel, Milton K. Joseph, Esq., upon oral examination on January 11, 1960, at Suite 3300, 135 South La Salle Street, Chicago 3, Illinois. Certain individual defendants (namely, Henry Crown, Irving Crown, Edward A. Crown, Robert Crown, Lester Crown, Herman Crown, Sidney J. Marks, Frank Nugent, Stuart Colson, George B. Harrington, and Hugo A. Andersen), upon being served with process on January 5, 1960, promptly joined in such notice for the taking of plaintiff's deposition.

(3) On January 8, 1960, plaintiff presented a motion supported by her personal affidavit requesting entry of an order that defendants be required to proceed by way of

written interrogatories to plaintiff under Rule 31 of the Federal Rules of Civil Procedure, or, in the alternative, oral interrogatories at the place of residence of plaintiff in New Jersey and at a time and place convenient to her, rather than Chicago, Illinois, as fixed in the notice theretofore served upon her.

4) The Court, having considered that motion, plaintiff's affidavit and brief in support thereof, and having heard arguments of counsel for the parties, found that the affidavit of plaintiff and the reasons and grounds advanced by her counsel for modification of the notice for the taking of her deposition so as to relieve her from coming to this jurisdiction and to require counsel for defendants to journey to New Jersey for that purpose were insufficient and insubstantial to warrant the relief sought, and the Court in the exercise of his discretion denied the motion.

5) Notwithstanding the denial of plaintiff's said motion, plaintiff failed and refused to appear at the time and place prescribed in the notice for the taking of her deposition. Plaintiff's reasons for her failure and refusal to appear, as announced by her counsel who appeared in her stead were merely a repetition of those theretofore advanced by her in support of her motion of January 8, 1960, which the Court had previously held were insubstantial and insufficient.

6) On her request, plaintiff was granted ample time to file counter-affidavits in opposition to defendants' motion to dismiss. On the last day of the period allowed, plaintiff filed the affidavit of Dr. George R. Henshaw, a New Jersey physician who attended plaintiff's daughter some months ago.

7) Neither Dr. Henshaw's affidavit nor plaintiff's affidavit or brief advances any grounds or reasons for her re-

fusal and failure to appear for the taking of her deposition other than or different from those advanced in support of her motion of January 8, 1960.

(8) The affidavits of plaintiff and Dr. Henshaw and the reasons and grounds advanced by her counsel as justification for her refusal and failure to appear for the taking of her deposition are superficial, insubstantial and insufficient.

(9) Though ample opportunity was afforded plaintiff to excuse her failure and refusal to appear for the taking of her deposition she has failed to do so. She persists in her refusal to appear.

(10) Plaintiff's failure to appear for the taking of her deposition was intentional and deliberate and was in the face of the denial by the Court of her motion of January 8, 1960.

(11) Plaintiff's refusal to appear in this jurisdiction on January 11, 1960, to give her deposition was and is a wilful failure and refusal by her to comply with and to give discovery under the Federal Rules of Civil Procedure and the rules of this Court, and warrants the striking of her complaint and the dismissal of her action pursuant to Rule 37(d) of the Federal Rules of Civil Procedure.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's complaint be and it is stricken.

2. Plaintiff's action be and it is dismissed as to all defendants and all said defendants shall go hence without day.

3. Judgment be and is given defendants and against plaintiff for defendants' costs, which the Clerk of this Court shall assess, pursuant to Rule 54(d) of the Federal Rules of Civil Procedure.

Enter: Julius J. Hoffman
Judge

February 4, 1960.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Thursday, August 11, 1960

Before:

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

HON. WM. G. KNOCH, *Circuit Judge*

HON. .....

DOROTHY HENNESEY, etc., Plaintiff-Appellant,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 12996	
HENRY CROWN, et al., Defendants-Appellees.	

This matter comes before the Court on appellees' motion to dismiss this appeal for want of prosecution, and the answer of appellant to appellees' motion to dismiss appeal for want of prosecution.

On consideration whereof, IT IS HEREBY ORDERED and adjudged by this Court that this appeal be, and the same is hereby, Dismissed, for want of prosecution.

IT IS FURTHER ORDERED by the Court that that part of the answer of appellant to appellees' motion to dismiss appeal for want of prosecution which requests that this Court reconsider the order heretofore entered by this Court on August 3, 1960, denying appellant's motion for extension of time to file her appendix and brief, and for a further order allowing appellant to file her appendix and brief instanter, be, and the same is hereby denied.

Proof of Service

Received a copy of the foregoing brief in opposition to petition for Writ of Certiorari this [illegible] day of December, 1960.

/s/ Walton K. Joseph

Milton K. Joseph,
Attorney for Dorothy Hennesey, doing business as Hennesey & Co., a sole proprietorship,
Petitioner.

Received a copy of the foregoing brief in opposition to petition for Writ of Certiorari this 5th day of December, 1960.

Stuart S. Ball, Howard P. Robinson, Robert T. Beam, H. Blair White, and Frederic F. Brace, Jr.,

By /s/ Stuart S. Ball

Attorneys for General Dynamics Corporation,
Respondent.